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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1057

DOROTHY I. YUHAS AND NANCY ANDERSON,
Petitioners,

vs.

LIBBEY-OWENS-FORD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent, Libbey-Owens-Ford, respectfully urges that the Petition for Writ of Certiorari filed herein by Dorothy I. Yuhas and Nancy Anderson (hereinafter Petitioners) be denied.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Court of Appeals below properly held that the established problems which would occur in the absence of a "no-spouse" rule renders the rule manifestly related to the employment in question and thus justified by sound business considerations.

2. Whether the Court of Appeals below properly found that in the absence of any built-in headwinds against female employment, a rule justified by sound business considerations is

not in violation of Title VII where there is no evidence of intentional discrimination.

3. Whether the Court of Appeals below properly considered the statistical proof in this case pertaining to the present disparity between men and women in the Company's work force.

STATEMENT OF THE CASE.

Respondent wishes to add the following summary to the Petitioner's Statement of the Case.

At the trial in this cause, Petitioners did not introduce any evidence in their case in chief or in rebuttal. Instead, the Petitioners chose to rely upon the uncontroverted facts that at the time the no-spouse rule was adopted at the Ottawa plants, the work force consisted very heavily of male employees and that the rule at the time of trial had resulted in more females than males being disqualified from employment.

Respondent, on the other hand, proved at trial the origin of the rule, the business reasons behind the rule, the myriad difficulties which would inevitably occur in the absence of the rule, and the overall necessity of the practice for plant efficiency and morale. With respect to the latter two elements, Respondent introduced expert witness testimony of the genre of specific problems that naturally flow from employment of spouses in the same organizational unit. This evidence was not rebutted.

At the close of the trial, the District Court held that the Respondent had not established business justification for the practice because "the Court heard no hard information as to what specific production problems were ever caused in any particular case" (App. 18a). The unrebutted evidence of specific problems which would occur if the rule were eliminated was rejected on the grounds that the evidence of "problems at the Ottawa plant [was not] specific and concrete" (App. 19a).

Petitioners' rendition of the facts conveniently phrases the evidence in the record on the issue of business justification as

consisting of only "potential problems" pertaining to various facets of the employment relationship. The record, however, as found by the Court of Appeals, demonstrates that the problems testified to by Respondent's expert witness are not "potential" but rather are necessarily unavoidable consequences of the employment of spouses in the same organizational unit.

In reviewing the District Court's decision, the Court of Appeals noted that specific instances in the past of particular production problems are not the only way of establishing sound business considerations. The Court noted that the evidence clearly showed that at least four serious problems pertaining to job performance, grievance processing, supervision capabilities and hiring justify the rule's operation. The Court of Appeals then found that the evidence demonstrated that the no-spouse rule " 'improves' the work place" (App. 8a).

In this context, the Court then examined the record for any indication of intentional discrimination against females. The Court found none, and the Court therefore concluded that this is not a case where an employer has promulgated a facially neutral rule in an attempt to perpetuate the effects of past discrimination. The evidence revealed exactly the contrary—during the rule's operation, the number of women employed by the Company steadily increased. Absent evidence that the rule penalizes women on the basis of their environmental or genetic background or evidence of intentional discrimination resulting in the present disparity between men and women, the Court properly reversed the District Court by holding that the rule is premised on sound business considerations and thus not in violation of the Act.

REASONS THE WRIT SHOULD NOT BE GRANTED.

The decision sought to be reviewed here is consistent with the decisions of this Court that a facially neutral rule manifestly related to job performance is not in violation of Title VII.

Contrary to Petitioners' assertions, this is not the first case in which job-relatedness has been reviewed by the United States Court of Appeals for the Seventh Circuit, and is not in conflict with the instructions of this Court in its various decisions on this issue. Moreover, the decision does not expressly conflict with any other decision of the United States Courts of Appeals in that in every decision rendered on the validity of a "no spouse rule," courts have found the rule not violative of Title VII of the Civil Rights Act, as amended. Because this decision is in conformity with the Act and the decisions of this Court, review by the Supreme Court can only result in unsettling what has previously been settled.

ARGUMENT.

I. The No-Spouse Rule Is Manifestly Related to the Employment at Issue and Is Thus Justified by Sound Business Considerations.

Not every practice which results in a disproportionate impact between members of different races or sexes is a violation of Title VII. Neither this Court nor any lower federal court has yet so held. In particular circumstances, such a practice may be unlawful, but only if *inter alia* the practice is not "shown to be related to job performance". *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971).

Although quoting this language from the *Griggs* decision, Petitioners urge that it is not enough to demonstrate the inextricable intertwining of the practice with the employment in question. Instead, Petitioners state that it discerns from decisions of other Courts of Appeals an evidentiary test of "business necessity" far beyond any showing of job relatedness. The test propounded by Petitioners is apparently twofold:

(a) The connection between the practice and the business operation must be established by empirical evidence

demonstrating that the rule is absolutely necessary to the continued operation of the Employer's business; and

(b) Assuming such has been proven, the employer remains under an obligation to research every other possible method of eliminating that problem and proving to the plaintiffs' satisfaction that no other method exists.

No decision of this Court is cited in support of this proposition. The Courts of Appeals decisions cited by the Petitioners are in each instance factually and legally distinguishable from the proposition asserted herein, and need not be examined in the light of this Court's clear holdings.

The state of the law postulated by this Court may be found in its decisions in *McDonnell Douglas Corporation* v. *Green*, 411 U. S. 792 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *General Electric Company* v. *Gilbert*, 429 U. S. 125 (1976); *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977) and *Dothard* v. *Rawlinson*, ... U. S. ....., 97 S. Ct. 2720 (1977). The criterion employed through all of these cases is stated simply in the *Dothard* decision as follows:

> ". . . Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question'. . . . If, the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship'." (*Dothard* v. *Rawlinson*, ... U. S. ....., 97 S. Ct. 2720, 2726 (1977).)[1]

1. Contrary to Petitioner's assertion (Pet. Br. p. 7), the Court of Appeals for the Seventh Circuit has had prior occasions to apply the business purpose test mandated by this Court. In *United States* v. *City of Chicago*, 549 F. 2d 415, 427 (1977), the Court specifically noted its various facets.

In determining whether any given standard has a manifest relation to the employment, this Court has noted that problems "resistant to empirical proof" may well constitute "rational and neutral business justification" for a particular employment policy. *McDonnell Douglas Corporation* v. *Green, supra,* at 806, n. 21.

Among those considerations resistant to empirical proof, but yet establishing job relatedness, are the efficiency of the work force and the loyalty of the individual members of that work force. *Nashville Gas Company* v. *Satty,* ..... U. S. ....., 98 S. Ct. 347, 352 at n. 5 (1977). Similarly the loss of overall plant efficiency has been found by this Court to constitute an "undue" accommodation by an employer under Title VII. *Trans-World Airlines, Inc.* v. *Hardison,* 432 U. S. 63, 84-85, (1977).

This Court has also spoken as to the appropriate measure of proof in cases where problems are resistant to empirical proof. Thus in *Dothard* v. *Rawlinson, supra,* the Court found that the much stricter requirements of a *bona fide* occupational qualification were properly established by means of expert witness testimony, even though there was no evidence that the specific problem testified to by the expert had previously occurred.

Thus the Court of Appeals herein correctly found that the no-spouse rule's business justification is established by the testimony in the record that serious problems relating to the plant efficiency and morale would occur in the absence of the rule.

With respect to Petitioners' contention concerning other alternative methods of handling these problems, there is no finding by the District Court that any alternatives exist; nor was any rebuttal evidence placed in the record by Petitioners concerning such alternatives. The Court of Appeals rightfully refused to hypothesize on this issue because alternatives to the rule were neither presented nor found. See *Trans-World Airlines* v. *Hardison, supra.*

II. In the Absence of Any Built-In Headwinds to Female Employment, the Burden Was Properly Placed Upon the Petitioners to Establish Intentional Discrimination on the Basis of Sex.

The burden of proof in any proceeding arising under Title VII of the Civil Rights Act of 1964 rests squarely upon the plaintiff. *General Electric Co.* v. *Gilbert, supra.* In fulfilling that burden of proof, the plaintiff, as here, may attempt to posit its cause of action on the theory of "disparate impact", as that term has been defined and described by the decisions of this Court.

This Court noted in *International Brotherhood of Teamsters* v. *United States, supra,* at 349, that there may well be more than one type of "disparate impact" case. There the Court specifically stated: "One kind of practice is that which perpetuates the effect of prior discrimination. . . ." Here, the Court of Appeals, in accordance with that statement, searched the record for evidence to ascertain whether the no-spouse rule was in fact furthering any intentional past discrimination against female applicants. As shown in III *infra,* the Court properly found no such basis for questioning the stated business reasons prompting the rule.

Thus, contrary to Petitioners' assertion, the Court of Appeals did not posit as an absolute rule that intentional discrimination is part and parcel of every "disparate impact" case; to the contrary, the Court in accordance with this Court's instructions to the lower courts in *McDonnell Douglas* v. *Green, supra,* did not end its inquiry with the finding of sound business considerations underlying the rule, but rather the Court, to the benefit of the Petitioners' case, examined the record to determine whether this rule was a pretext designed to hamper employment opportunities for women.

The Court of Appeals also properly examined the record to determine whether the practice was one similar to that in issue

in *Dothard, i.e.* a rule or practice directly related to the genetic or environmental characteristics of one race or sex. In *Dothard,* the Court noted "the gist of the claim . . . does not involve an assertion of purposeful discriminatory motivation." (97 S. Ct. 2720 at 2726). The Court found disparate impact on the basis of national statistics measuring all females, and not on the basis of the particular physical characteristics of women attempting to seek employment at the defendant's facility. Specifically the Court found that over 41% of all women in the United States could not fulfill the physical characteristics criterion established by the Company as compared to only one percent of all men in the country.

This, of course, was not the issue presented to the Court of Appeals, nor is it the issue presented to the Court by the Petitioners. Here, no physical characteristic peculiar to women is involved; here, no educational or testing bias peculiar to women is presented. Here, a rule premised on the fact that of all married people 50 percent are women and 50 percent are men is presented, and this fact forms the only statistical basis in the case with respect to women. None of the cases decided by this Court or by the Courts of Appeals, touch upon impact peculiar to the subclass of women involved here, as opposed to women or racial minorities in general.

Petitioners' silence on this fact may well be prompted by the fact that in every case deciding the validity of the no-spouse rule, the court has found the rule to be lawful: *Harper* v. *Trans-World Airlines, Inc.,* 525 F. 2d 409 (8th Cir. 1975); *Smith* v. *Mutual Benefit Life Insurance Co.,* ..... F. Supp. ....., 13 FEP 252 (D. N. J. 1976); *Tuck* v. *McGraw Hill, Inc.,* 421 F. Supp. 39 (S. D. N. Y. 1976).

The Court of Appeals properly applied this Court's decisions in requiring in the particular circumstances herein proof that the rule was rooted in a pattern of intentional discrimination, in light of the sound business considerations necessitating the rule.

III. The Court of Appeals Properly Considered the Statistical Proof Pertaining to the Disparity Between Men and Women in the Company's Work Force.

Petitioners maintain that the disparity between the sexes in the composition of the Company's work force at the time the Rule was adopted at the Ottawa Plant raises a presumption of discrimination and that the Court of Appeals erred in not finding such discrimination established by the presumption.

A careful examination of this Court's decision in *International Brotherhood of Teamsters* v. *United States, supra,* supports the conclusion, however, that the Court of Appeals properly considered the statistical proof referred to by Petitioners. In *Teamsters,* unlike here, the Court noted that the Government's case was not based upon "statistics alone", but included testimony of "40 specific instances of discrimination." This Court further noted that the use of statistics is approved "where it [has] reached proportions comparable to those in this case."

Here, the statistics relied upon do not reach such proportions. In fact, the statistics herein are totally infirm in that there is no showing of any comparable statistics of what the work force could fairly be expected to demonstrate in terms of the availability of females for heavy manufacturing work.

More importantly however, this Court in *Teamsters* has cautioned the lower courts that the "usefulness [of statistics] depends on all the surrounding facts and circumstances".[2] The surrounding facts and circumstances of the present case, such as the increasing number of women in Respondent's employment both in absolute numbers and percentages participation rate, do not justify the conclusion that such presumption is appropriate here.

2. The Fifth Circuit, which Petitioners maintain follows a rule of presumption on bare statistics alone had occasion quite recently to rule that prior discrimination was not proved in all the circumstances presented by a mere showing of a marked disparity between members of different races in particular job classifications. *Weber* v. *Kaiser Aluminum and Chemical Corp.,* ..... F. 2d ....., 16 FEP 1, 7 (5th Cir. 1977).

Moreover, in any event, if the bare statistics could be read as establishing an inference of prior discrimination, this Court in *Hazelwood School District* v. *United States,* ..... U. S. ....., 97 S. Ct. 2736 (1977), mandated that an employer must be given the opportunity to show "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination". See also *International Brotherhood of Teamsters* v. *United States, supra,* at 360.

In the instant case, the Respondent showed just that. Specifically the evidence before the Court of Appeals revealed that the month Petitioner Yuhas applied for employment in 1969 was the first significant hiring of any factory employees since 1960. None of the decisions referred to by the Petitioners have found discrimination on the basis of a statistical imbalance in the work force during the decade preceding the decade in which Title VII was enacted. See generally *United Air Lines, Inc.,* v. *Evans,* 431 U. S. 553 (1977).

Finally, contrary to Petitioners' assertions in their brief, the Respondent did offer an explanation for the seeming disparity between men and women in the work force. The Seventh Circuit properly found that the present imbalance was a historical development and was not the result of discriminatory conduct by the Company. In support of that holding, the Seventh Circuit pointed out that at other plants of the Respondent, "historical circumstances operated differently and there is a majority of female workers. In those plants, the no-spouse rule, which is in effect on the company-wide basis, has a discriminatory impact on men" (App. 9a). As set forth earlier, those are the very facts and circumstances which this Court held in *Teamsters* had to be examined before deciding what weight should be given statistical proof in a Title VII case. In this regard, it should be noted that the District Court made no finding of prior discrimination after the trial on the merits.

For the foregoing reasons, the Respondent maintains that the Seventh Circuit, in accordance with the opinions of this Court,

properly considered the only statistical evidence presented in this case pertaining to the disparity between men and women in the Respondent's work force.

CONCLUSION.

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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